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# SUPREME COURT OF THE UNITED STATES.

**October Term, 1906.**

**No. 101.**

THE UNITED STATES,
Plaintiff in Error,

vs.

THE PAINE LUMBER COMPANY.

**In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.**

## BRIEF FOR THE PAINE LUMBER COMPANY.

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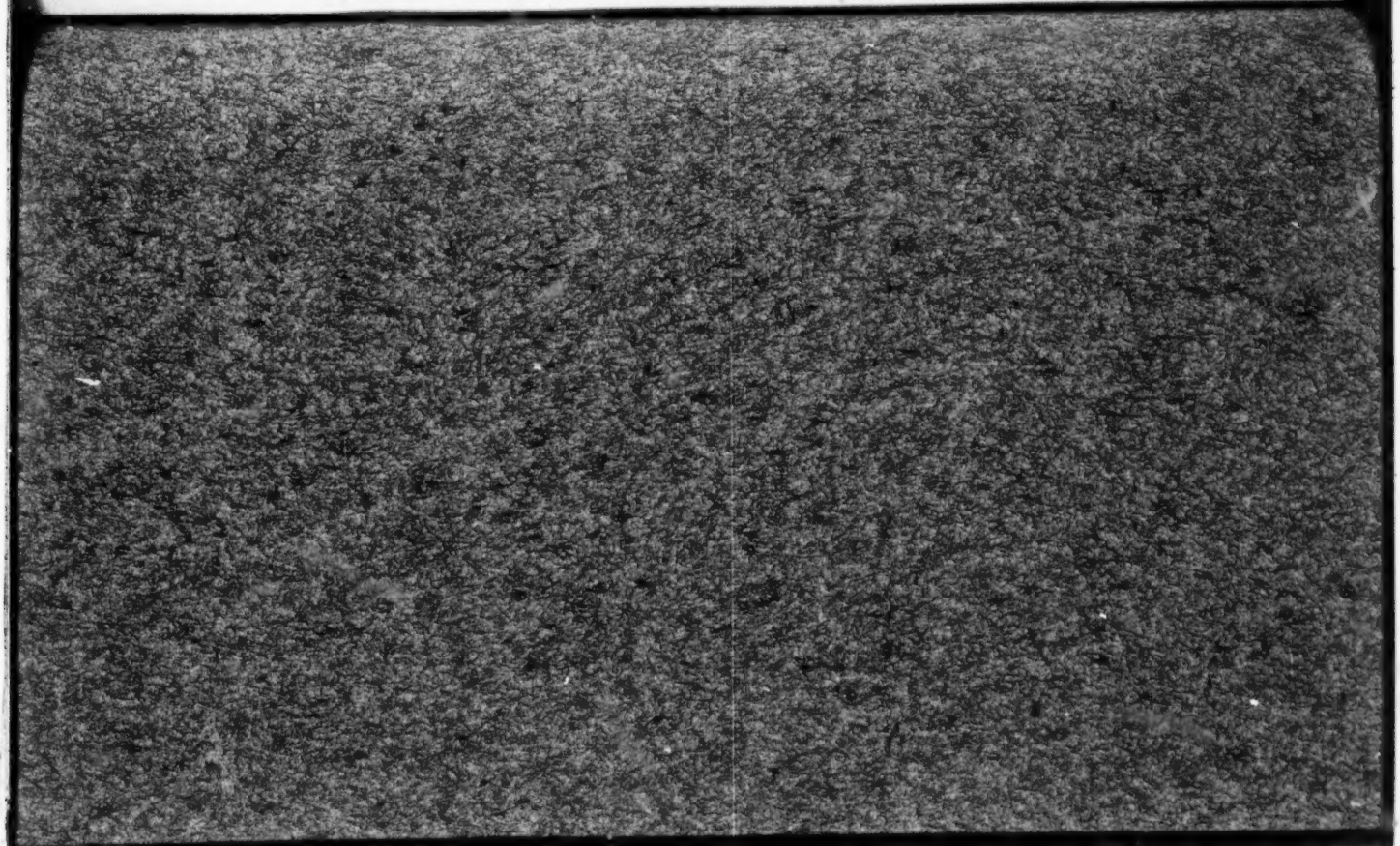

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## BRIEF FOR THE PAINE LUMBER COMPANY.

As this case involves somewhat the treaty obligations between the United States and the Stockbridge Indians, we deem it important to briefly review the history of the relations between them.

### STATEMENT.

"The Stockbridge Indians came originally from Massachusetts and New York."

At the time of the Revolution, they were christianized and were settled in New Stockbridge, New York, on the lands of the Oneida Indians, one of the Six Nations. Some of their citizens were soldiers in the American army in the War of the Revolution, and held commissions; many of them were well educated.

Wisconsin Historical Collections, Vol. 15, page 39.

The original name of the tribe was Muhheconunck.

Ibid. Page 6.

Of the Six Nations, the Oneidas and the Tuscaroras, and the friendly Indians living with the Oneidas (Stockbridge) were on the side of the colonies, and the others sided with the British.

By the treaty of Oct. 22, 1784, (Vol. 2, Indian Laws and Treaties, page 3), the Oneidas and Tuscaroras were secured in the possession of the lands on which they were settled.

By the treaty of Nov. 11, 1894 (Vol. 2, Indian Laws and Treaties, page 27) by Article 2 thereof, the title of the Indians and **"their Indian friends residing thereon and united with them"** was acknowledged, with the provision that "said reservations shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

By the treaty of Dec. 2, 1794 (Vol. 2, Indian Laws and Treaties, page 29), the assistance and loyalty of the Oneida, Tuscarora and Stockbridge Indians were officially recognized, and they were partially reimbursed for their losses during the Revolution, their homes having been pillaged during the war.

In 1808-10, when the plan of forming settlements for the eastern Indians in the White river country in Indiana was in contemplation, some of the leading Stockbridge Indians were in favor thereof, and prior to 1818 about 800 of them removed to Indiana.

Wis. Historical Collections, Vol. 15, page 41.

Subsequently the Stockbridge Indians purchased some lands on the Fox river in Wisconsin, of the western Indians, and some of them removed there. Some question arising as to their rights there, under a tentative understanding with the United States, the Stockbridge Indians removed to two townships of land, on the east side of Winnebago Lake, in the state of Wisconsin, containing 46,080 acres.

In the treaty with the Menominees (Wisconsin Indians) of Feb. 8, 1831 (Indian Laws and Treaties, Vol. 2, page 228), a proviso was inserted by the United States Senate (Indian Laws and Treaties, Vol. 2, page 233) setting apart the said two townships of land on the east side of Lake Winnebago for the Stockbridge and Munsee tribes.

Which provision for the Stockbridge Indians was confirmed by the treaty with the Menominees of Oct. 27, 1832 (Indian Laws and Treaties, Val. 2, pages 276-278).

By the treaty of Sept. 3, 1839 (Indian Laws and Treaties,

Vol. 2, page 391), the Stockbridge and Munsee Indians ceded the United States the east half of the two townships east of Lake Winnebago, and the United States agreed to pay one dollar an acre therefor, a part to be paid to the Stockbridge Indians remaining on the other half of the land, and a part to those who contemplated moving west of the Mississippi. The plan for the removal west of the Mississippi did not materialize, and by the Act of Congress of March 3, 1843, it was provided that the lands east of Lake Winnebago "may be partitioned and divided among the different Indians composing said tribe of Stockbridge Indians, and may be held by them separately and severally **in fee simple**, after such division." A board of commissioners of five of the tribe was provided for to make the distribution, and thereupon by section 7 of the Act the Indians were to become citizens of the United States and the Territory of Wisconsin.

A portion of the Indians not desiring to avail themselves of the provisions of this Act, it was repealed by the Act of Aug. 6, 1846, and on Nov. 24, 1848, a new treaty was entered into with the Stockbridge Indians. (Indian Laws and Treaties, Vol. 2, page 425.) The Act of 1846 had attepted to provide for the dividing of the township into two parts, one to be held by the Indian citizens of the United States, the other by the party desiring to keep up the tribal organization. But the white people had rushed in under the provisions of the law of 1843, and as recited in the treaty of 1848, it was found impracticable to carry the provisions of the Act of Aug. 6, 1846, into effect. By this treaty of 1848 the Stockbridge tribe of Indians sold to the United States all lands east of Lake Winnebago which had not been alloted to the Indians who had become citizens of the United States, the United States agreeing to pay therefor $31,004.85, and the additional sum of $5,000 indemnity for certain lands on White river in the state of Indiana. The Indians were not satisfied to move to the lands set apart for them west of the Mississippi (in Missouri, See Article 2, Treaty of Jan. 15, 1838, with the New York Indians), and also refused to remove to another location in Minnesota, which the government offered them, and they applied for a retrocession to them of the township of Stockbridge, which the United States refused, and thereupon, after considerable negotiations, the Stockbridge and Munsee Indians entered into the treaty of Feb. 5, 1856, with the United States. (Indian Laws and Treaties, Vol. 2, page 556.)

## TREATY OF 1856.

By this treaty the Stockbridge and Munsee tribes and all the individual members of said tribes ceded and relinquished to the United States all their right and title in the lands in the town of Stockbridge, Wisconsin (east of Lake Winnebago), and in the 72 sections of land in Minnesota, and in and to the $20,000 and the $16,500 to be paid them by the United States under Article 9, Treaty of 1848, and also released all claims of the tribes and of **the individual members** of the tribes to the annuities of which they had been deprived since the year 1843. (See Article 1 of Treaty.) In consideration thereof, by Article 2, the United States was to select and give them a tract of land in the state of Wisconsin, in the southern part of the Menominee Reservation, of sufficient extent to provide for each head of a family and others lots of land of 80 and 40 acres.

By Article 3 the United States was to cause the lands to be surveyed, and the council of the Stockbridges and Munsees, under the direction of the Superintendent of Indian Affairs, were to make a fair and just allotment among the individuals and families of the tribes. Each head of a family was to have eighty acres or more, if the family contained over four members. Allotments to single persons were also provided for. It was further provided:

"After the said allotment is made, the persons entitled to land may take immediate possession thereof, and the United States will thenceforth and until the issuing of the patents as hereinafter provided hold the same in trust for such persons, and certificates shall be issued in suitable form guaranteeing and securing to the holders their possession and **the ultimate title to the land**; but such certificates shall not be assignable, and shall contain a clause expressly prohibiting the sale or transfer by the holder of the land described therein. After the expiration of ten years, upon the application of the holder of such certificate made with the consent of the said Stockbridge and Munsee council, and when it shall appear prudent and for his or her welfare, the President of the United States may direct that such restriction on the power of sale shall be withdrawn and a patent issued of the usual form. Should any of the heads of families die before the issuing of certificates or patents herein provided for, the same shall issue to their heirs; and if the holder of any such certificate shall die without heirs, his or her land **shall not revert to the United States.**"

It appears from the accompanying report of Francis Huebschmann (Indian Laws and Treaties, Vol. 2, page 565), who negotiated the treaty, that it was intended by the government to give immediate patents to the individual Indians of these lands in the southern part of the Menominee Reservation; that the provision for deferring the patents for ten years was inserted solely at the suggestion of a portion of the Indians themselves.

That is, so far as the United States and the Indians were concerned, this was intended to be a valid grant to the individual Indians and their heirs forever for valuable consideration of the three townships in the southern part of the Menominee Reservation. The title so created was not an ordinary Indian title, and was not one of occupancy alone, but was a grant of an interest forever, for a valuable consideration, and for the benefit of the individual members of the tribe.

The United States guaranteeing and securing to the individual holders of the selections or allotments "**ultimate title**," and it being expressly provided that patents should go, in case of the death of the allottee to his heirs, and "should not revert to the United States."

This was no recognition by the government of the mere right of occupancy by wild and untutored savages of a large part of the national domain.

It was a binding agreement, for a valid consideration, between the United States and a small number of christianized and civilized Indians, who gave up many thousands of dollars which the United States then owed them, in exchange for two townships of land, which was to be distributed between the individual Indians, and they were guaranteed the ultimate title thereto, it being further provided that it should not revert to the United States.

Contemporary history furnishes evidence of the civilization and progress of this people at the time of the treaty.

"These tribes—indeed, it may be said, this tribe (the Stockbridges), for of the Munsees there probably remain not more than half a dozen souls—were formerly an intelligent, prosperous people, not a whit behind the most advanced of the race, possessed of good farms, well instructed and industrious. Unfortunately for them, though much to the advantage of the government, which acquired thereby a valuable tract of country for white settlement, they removed in 1857 to their present

place of abode. The change has proved highly detrimental to their interests and prospects. Their new reservation, the greater part poor in soil and seriously affected by wet seasons and frequent frosts, has never yielded them more than a meager sustenance."

A Century of Dishonor, by Helen Jackson, page 416.

After the treaty of 1856, the Stockbridges and Munsees moved on to their new grant and alloted the lands to the heads of families and individuals of the tribe.

2nd Find of Fact, Printed Record, page 10.

Opinion of trial judge, page 14.

Of course the allotments did not take all of the two townships, and as new families grew up further allotments were made.

It is also undoubtedly true that a number of the Indians preferred to live in little settlements or towns on their land, and all of them did not live on their respective allotments.

The government did not and does not contribute to their support, except that on the sale of a part of the unalloted lands under the Act of Feb. 6, 1871, there has been created a small fund, the income of which gives them about $5.80 each per year.

See Appendix A. to this brief.

The Indians finding it difficult to subsist on the wild and timbered lands of the new reservation, Congress passed the Act of Feb. 6, 1871 (Vol. 1, Indian Laws and Treaties, page 128), for the sale of all but eighteen (18) sections, being the "18 contiguous sections embracing such as are now actually occupied and improved," which the Secretary of the Interior was authorized to reserve from sale.

Whether or not this Act was valid in as far as it affected unoccupied lands is perhaps immateral, especially as the sale of a township and a half seems to have been ratified by the acceptance of the annual income from the fund produced by such sale. It, however, seems to us too clear for argument, that the act did not and could not affect the rights of Indians of the tribe in and to their allotments which were grants to them for a valid consideration, and with the guaranty of the United States that they should have ultimate title, and the further provision that such title should not revert to the United States.

In case of the allotments, the allotees were then in possession, and held and had the full equitable title to and beneficial

use of the land and were guaranteed the ultimate title, and the United States retained no interest therein, other than the bare legal title, which for a consideration they were bound ultimately to transfer to the individuals of the tribes by patent.

Further, under that Act, the government never attempted to dispose of the 18 sections of occupied land, and the Indians never consented to any disposal thereof, and the right and title of the individual Indians thereto has since been recognized and reaffirmed by the Acts of March 3, 1893, (27 Statutes 744) and June 21, 1906 (34 Statutes 382).

It was evidently contemplated by the Act of 1871 that a part of the fund from the sale of the lands might be used in procuring new lands for the Indians (sec. 5 of the Act), and by section 7 it was provided that they "may be located upon lands reserved by the second section of this Act (clearly meaning the unalloted part of the 18 sections) or such other reservation as may be prescribed for them, with the assent of the council of said tribe."

And by section 8 provision was made for alloting any new lands that might be purchased for them "either at their present home or elsewhere," meaning new lands that they might acquire in their then home on the Menominee Reservation, which contained some nine or ten townships, or in some other part of the country; and by section 9 it was provided "thereafter the title of the lands described therein shall be held by the United States in trust for individuals and their heirs to whom the same were alloted."

In the main, the Act of 1871 was doubtless intended to be a confirmation of the rights of the individual Indians in their allotments, and to enable the Indians to dispose of some of the unalloted lands, so as to secure a fund for their support, or if they preferred to purchase additional and better lands elsewhere.

The act, however, could not affect the contract and vested rights of individual Indians in their allotments, and this proposition is not at all antagnostic to the general power of Congress to legislate contrary to the terms of treaties with other nations or Indian tribes.

By the Act of March 3, 1893 (27 Statutes 744) it was provided that all members of the tribe who entered into possession of the lands under allotments of 1856 or 1871 and who by themselves or their lawful heirs have resided on said lands since

be declared to be owners of such lands in fee simple in severalty, and it was provided that the allotments of 1856 should prevail over any conflicting allotments of 1871.

This Act shows that Congress never intended to in any way abrogate the treaty of 1856 by the Act of 1871, except as they provided a way for the Indians to dispose of a portion of the reservation if they so desired, and reaffirms the validity of the treaty of 1856 and the rights of the allotees thereunder, as being superior to the rights of any contesting allotees under the Act of 1871, and recognizing the principal we contend for, to-wit: That the Act of 1871 could not affect the allotments and rights under the treaty of 1856, and that insofar as the Act of 1871 may have attempted so to do, it was void.

By the Act of June 21, 1906 (34 Statutes 382), the United States has ratified and reaffirmed not only the treaty of 1856, but the allotments made by the Indians thereunder, and has directed the issuing of patents in fee simple therefor, and has made the allotments obligatory upon the members of the tribe who have made a selection of land within the reservation, whether filed with the tribal authorities or otherwise.

This Act is important here, not because it creates new rights, but because it is a practical construction of the rights of the allotees under the treaty of 1856 and the Act of 1871, in accordance with the claims always made by the Indian allotees, that is, that their allotments were valid, and that the individual allotees were the owners of the land rightfully entitled to the possession of it, and ultimately entitled to patents therefor.

The Stockbridges had done all that was required on their part under the treaty of 1856 in regard to making the allotments, the allotees had constantly asserted ownership, and the adoption by the United States, by the Act of 1906, of the same construction of the rights of the allotees as had been long claimed by them is a construction by the parties of the rights of the allotees in their favor and as such a construction of their rights is a proper subject for consideration by the courts.

The timber, for the value of which the United States government sued the defendant below, was cut on alloted lands by two allotees, Thomas Gardner and Daniel Davids.

Their allotments were made long prior to the acts alleged in the complaint (January, 1899), and under the treaties and arrangements between the Stockbridge and Munsee Indians and the United States.

Finding of Fact No. 2, Record, page 10.

There were members of the tribe, heads of families, and the allotments were made to them respectively, as their separate and individual allotments.

Record, page 11.

They thereupon entered into immediate possession of their respective allotments and ever after claimed to own the same as their allotments, and have constantly asserted their ownership and right to take timber therefrom under said treaty.

Finding of Fact, No. 3, page 11.

Their respective rights to the occupancy of the land alloted to them has been recognized and protected by the United States.

Finding of Fact 4, Record, page 11.

The allotees have always and constantly asserted ownership and right to take timber.

Judge Seaman's opinion, Record, page 14.

The timber in this case was cut "for the purpose of providing means for the support of their families;" was done in good faith; each of them claiming and believing that he had the right to so cut for said purpose.

Finding 5, Record, page 11.

After the cutting, the allotees sold the same to the defendant, who bought in good faith.

Findings 6 and 7, Record, page 11.

As stated in the opinion of Judge Seaman, the allotees had always claimed the right to cut timber on their allotments, and it was not for many years after 1856 that their right was questioned.

Their lands were a part of the original Menominee Reservation. The Menominees had only the right of occupancy. The government was exercising control over their (the Menominees') timber, and the real fact is that in the course of time the succeeding Indian Superintendents failed to distinguish between the different kinds of title. The result was that this suit, as well as several others, including certain criminal proceedings against the allotees themselves were commenced in the fore part of 1902. And the fact is, that these suits were commenced on the theory that these allotees had no other rights than the ordinary Indian title of occupancy, and that the United States was entitled to recover in its own name and for its own benefit the value of the timber, under the case of Cook

against the United States, 19 Wallace 592. Such being the statement made in the printed forms for propositions of settlement furnished by the government to those who had purchased logs from the Indians.

## THE GOVERNMENT'S POSITION IN THIS CASE.

After investigation, the United States has decided to dismiss the companion case against the Torrey Cedar Company, being No. 100 on the calendar of the October Term, 1906, and has also decided in this cast not to ask a recovery for the logs cut upon the selection of Thomas Gardner.

United States brief, pages 26-39.

And stipulation of dismissal in Case No. 100.

This is, as we understand it, because the allotees in the Torrey Cedar Company case, and the allotee, Thomas Gardner, in this case, are conceded to have been, under the act of 1893, owners in fee simple of their respective allotments.

## THE QUESTION HERE.

**The sole question here then is, as to the right of the government to collect, in this action, from the defendant for the logs cut upon the allotment of Daniel Davids.**

There being no bill of exceptions here, we take it that the judgment of the lower court should be sustained, unless it is contrary to the reasonable intendment of the facts found and stipulated.

We concede that in the stipulation and in the findings there is no statement of the exact date when Daniel Davids' allotment was made to him. Neither have we the exact information as to the actual date.

We think, however, that the only reasonable construction of the findings and stipulations is that Daniel Davids' allotment was made under the treaty of 1856, and prior to 1893, the court having found that it was made long prior to the acts alleged in the complaint (A. D., 1899) and that it was done "under the treaties and arrangements with the United States."

Finding 2, Record, page 10.

"That thereupon Daniel Davids entered into immedate possession" of his allotment, and has ever since claimed to hold the same as his allotment, and has constantly asserted his ownership and right to take the timber therefrom "under the said treaty and arrangements with the plaintiff."

Finding No. 3, Record, page 11.

Daniel Davids' right to the occupancy of the parcel claimed and held by him has been recognzed by the government, and his right to the occupancy of his allotment has been recognized by the United States.

Finding 4, page 11.

It is conceded that Daniel Davids had no house on his allotment.

Finding 9, Record, page 12.

And the government's claim, as I understand it, is, that because Daniel Davids has not "resided on said lands continuously since" entering into possession of his allotment, that he is not entitled to a patent under the act of March 3, 1893, as the other allotees in this case and in the other cases are now conceded to be.

It is a verity in this case that the cutting of timber by Daniel Davids was done **"for the purpose of providing means for the support of his family"** and in good faith, he claiming and believing that he had the right to so cut for said purpose.

## THE CONTENTION OF THE GOVERNMENT.

The position of the United States in this case simmers down to this: **that because Daniel Davids did not reside on his allotment, he is not within the provisions of the act of 1893.**

And that under the treaty of 1856 his right in the land was "a mere right occupancy."

United States brief, page 29.

That therefore the United States, **in its own right,** was the owner of the land and timber and entitled in this action to recover for its own benefit, under the case of United States vs. Cook, 19 Wall. 592.

## ARGUMENT.

The contention of counsel for the Government that the allotees among the Stockbridge and Munsee Indians had no right to cut timber on their allotments, except for the purpose of preparing the ground for agriculture, seems to rest solely upon the supposition that the decision of the Supreme Court of the United States in the case of U. S. vs. Cook, 19 Wallace, page 591, is applicable thereto.

Therefore, it seems that the primary question to be here determined is whether or not such rule is applicable to the facts in these cases and if not what the proper rule is.

That case arose on the Oneida reservation. In their statement the Supreme Court call attention to the fact that the Oneidas held their lands under the same tenure as the Menominees.

As a matter of fact the treaty with the Oneidas of 1838, (Indian Affairs, Laws and Treaties, Vol. 2, page 382), in Article Two, specifically provided that the Oneida lands should be "held as other Indian lands are held."

The right of the United States to recover in that action was based upon the fact that the Indians had only **the right of occupancy**; that the remainder was in the United States and that their respective rights were to be determined **by the ordinary rules of law applicable to tenants for life and remainder men**, and that because such a tenant would not be allowed to commit waste or cut timber that an Indian tribe or Indians of a tribe would under their right of occupancy have no such right; that such cutting would be waste and timber cut the property of the remainder man, in that case the United States.

The two essential facts in that case were that the Indians had only the right of occupancy, and that the United States, holding the remainder, was the owner and entitled to recover the timber.

We contend that the title of the Stockbridge and Munsee Indians to their lands is entirely different; that under the treaty of 1856, (Laws and Treaties, Vol. 2, page 556, and 11th Stat.-at-Large, 663), both the rights of the Indians and of the United States were intentionally made different from the ordinary arrangements as to Indian lands. That is, as we understand that treaty, the whole equitable and beneficial title and interest, together with the right of possession, was given to the Indians and it was specially provided that said lands should not revert to the United States, and the United States guaranteed an ultimate title to the Indians, and after the making of such treaty the United States remained the mere repositary of the legal title for the sole purpose of transferring it at the request of the council and the president to the individual Indians. That is, the United States had no beneficial interest in the land, neither had it as trustee any duty in the premises to perform, neither had it any duty or charge as to the property, except to convey the legal title to the individuals when the council and the president so requested. The United States had and has, on its own account, no interest whatever in the lands, and no possible right by way of reversion or remainder.

It is therefore clearly evident that there was and is a difference between the title and rights of the Stockbridge and Munsee Indians under their treaty, and that of tribes holding, as the phrase is, "As other Indian lands are held."

But in the case of United States vs. Cook, another question was incidentally decided, and that is this: That the rights of the Indians and of the United States are to be determined, not upon the ground that Indians are Indians, but are to be determined upon the familiar principles of law applicable to all persons. (See opinion in that case, page 594.) That is, that the rights of the Indians to the estate granted them are the same as the rights of citizens of the United States holding similar estates, and in the case of the United States vs. Cook, the estate of the ordinary Indian tribe, which is merely a right of occupancy, was held to carry with it the rights of a tenant for life, because a tenant for life has similar rights of occupancy.

It is, we think, important, to examine carefully into the nature of the estate granted by the treaty to the Indians.

Of course it was ultimately intended to give the Indians a fee simple in both the legal and equitable estate, but the patents not having been issued, the question is, what was the right and estate of the Indians prior to the issuing of such patent.

As to this the treaty provides: (See Article Three).

First. The land was to be alloted among the individuals.

Second. Each individual was to take immediate possession.

Third. The United States was to guarantee and to secure to the holders of allotments their possession, **and an ultimate title to the land.**

Fourth. Should an allotee die his right should pass to his heirs.

Fifth. In case of his death without heirs, the lands should not revert to the United States.

Sixth.—The treaty was a contract for which the Indians paid a valuable consideration (See Article 1 of the Treaty), by ceding the United States their interest in divers tracts of lands and giving the United States many thousands of dollars then due them, including the giving up by the Indians of the tribe of their then unpaid annuities.

Seventh. There was no limitation or restriction upon the use of the allotee of his lands.

Eighth. The treaty was in effect in part a land contract for a valuable consideration, and such agreements to convey and conveyances may be made by treaty.

Holden vs. Joy, 17 Wall. 211-247.

Ninth. The contract part of the treaty based on a valid consideration could not be disturbed by Congress.

Tenth. The contract was between the United States and christianized and civilized Indians.

Eleventh. The provision for the withholding of the patent for a time was placed in the treaty agreement at the request of the Indians themselves and for their benefit, and not for the purpose of reserving any right, title or interest in the United States for the benefit or use of the United States.

Francis Huebschmann statement, Indian Laws and Treaties, Vol. 2, ,page 565.

Even under the Act of February 6, 1871 (which manifestly could not affect the vested estates of the individual Indians for which a consideration had been paid to the government, nor disturb the contract rights of the allotees provided by the treaty), it was in section 9 of the Act provided that "the title to the lands described therein shall be held by the United States in trust for individuals and their heirs, to whom the same were alloted."

So that in no case can we conceive of counsel for the government being correct when they speak of the allotee's title as "a mere right of occupancy."

The estate of the individual Indian was one in himself and his heirs, liable only to be defeated by the failure of heirs, and in that case the remainder over, not to the United States, but to the tribe, to be disposed of by its council, (which carried with it all equitable and beneficial rights, including the right of possession and use and everything, except the naked legal title, which should repose temporarily in the United States for the benefit, however, of such Indian).

Therefore, if we are to inquire into the rights of such Indians by determining the rights of holders of similar estates under the ordinary rules of law, we see that here there was created no mere estate at will or by sufferance, which might be the case in lands "held as other Indian lands are held," neither was the estate hereby created limited to the life of the possessor, but it was an estate which under the terms of the

treaty, at the very least, must continue, not only during the life of the person who went into possession, but as long as there were heirs of his to hold it. It seems to us that it was without any question an estate in fee. Of course his right was not in fee simple, because it might be terminated by there being no heirs, when it would revert to the tribe for disposition, but it was an estate in fee "because it might endure forever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances (the existence of heirs), which qualify and debase the purity of the donation, it is therefore a qualified or base fee."

Am. & Eng. Ency. of Law, 2nd ed., Vol. 11, page 368.
2 Blackstone's Com. 109.

It has always been the law, however, "that while this estate (tenancy under a base or qualified fee) continues, and until the qualification upon which it is limited, is at an end, the grantee has the same rights and privileges over his estate as if it were a fee simple."

See Am. & Eng. Ency. of Law, 2nd ed. Vol. 2, pages 369-370.
State vs. Brown, 27 N. J. Law 13.
1 Cruise 52, Tit. 1, sec. 86.

It is also evident that the right conveyed by the treaty, pending the issuing of a patent, was of greater extent than the estate of a tenant in tail, because under the treaty the rights were limited to the person and his heirs generally, while in a tenancy in fee tail the estate is limited to the heirs of his body.

It has always been the rule of law that a tenant in tail as against his remainder man and as against the world, had the right to cut timber on his land for any purpose. That is, such a tenant could not commit waste.

Blackstone says in his Commentaries, Book 2, page 115, "The incidents to a tenancy in tail are chiefly these: 1. That a tenant in tail may commit waste on the estate tail by felling timber, pulling down houses, or the like, without being impeached or called to account of the same."

See also Am. & Eng. Ency. of Law, 8nd ed., Vol II, page 374 ee.

The incidents to this estate were, first, that a tenancy in tail was not liable for waste.

See also Coke on Littleton, 224a.

That the treaty was an agreement founded upon a valuable consideration; that it was thereby intended that the Indians should take the full estate we have described, and that the lands should not revert to the United States, is, we think, plain on the face of the treaty. In fact, we consider it indisputable, but if there were any doubt, it would be removed by reading the accompanying report of Francis Huebschmann, from which it appears that the government, when it negotiated the treaty intended and desired to give the individual Indians full legal title and patents at once; that one Quinney, an Indian, objected thereto, and that to obviate his objection the provision for delaying the patents until the general council of the tribe should request it was inserted. (See Indian Affairs, Laws and Treaties, Vol. 2, page 565; 11th Stats.-at-Large, 673.)

Is it not, then, perfectly plain that the title intended to be given and given to the Stockbridge and Munsee Indians was not that of ordinary Indians, and was not to be held as other Indian lands are held, but that there was granted and conveyed to them at once all beneficial and equitable estate, with the immediate right of possession and use, the individual Indian taking his selection virtually in fee, with the agreement that ultimately the full legal title temporarily reposed in the United States, should pass to him, with the bare possibility that the estate of himself and his heirs might be defeated by the failure of heirs before the issuing of a patent, and then the remainder to the tribe for its disposition. The individual Indian, as to his selection or allotment, standing then, until the issuing of the patent, with a greater estate than a tenant in tail, should he not have at least the rights of such tenant?

In United States vs. Reese, 5 Dill. 405, the question involved the title of the Cherokees to their lands. Their treaty granted them the lands forever, provided always that the lands should revert to the United States, if the Indians should become extinct or abandon the same. It was held that the condition as to abandonment made the Indian title a base or qualified one. That there was only a possibility of reversion to the United States, that therefore all the estate was in the Indians, therefore that such lands could not be lands of the United States within the meaning of sec. 5388. And therefore the timber was not cut from the lands of the United States, nor did it belong to it.

If the question were to be decided, not strictly according to the rules of law affecting the possessors of different estates, but on the broad ground of intention of the parties, as shown

by the treaty, and considering the treaty as an agreement between a great and independent nation, and a small and dependent people, can it for a moment be doubted but what both parties thereto intended to provide thereby a permanent home for the individual members of the dependent nation to be used at their discretion for their support, with the one limitation that they should not be able for a time to convey away the legal title, and that provision solely for the benefit of the members of the dependent nation?

The lands affected were not argicultural, but were timber lands; neither could it be expected that they would use them otherwise than their white brethren would.

The Indians have no other means of support of any amount. (We presume the Court will take judicial notice of the Acts and Treaties whereby there is distributed during each year about five or six dollars to each Indian their share of the income on their funds held by the government. Appendix "A," hereto.

There was no agreement that they should become farmers. The land was wild. But was it not plainly the intention that they should get their living therefrom by their labor and in such way as they elected? Judge Drummond, in the case of United States vs. Foster, 2 Biss. 377, was of the opinion that Indians, even on the Oneida Reservation, had the right to cut timber for their support. Certainly it seems to us the Stockbridge and Munsee Indians clearly had that right under the treaty of 1856, and that they had the right to use it for hunting, fishing, tillage, fuel, wood and their ordinary support. If this was not the understanding and the intention and the meaning of the treaty, then indeed the government drove a hard bargain, for the possibility of the Indians supporting themselves otherwise on such lands was and is a slight one.

But in cutting the timber the Indian was not doing anything **malum in se**. He was carrying on an industry, which the white man of this country has long pursued without disgrace; he was learning to provide for the support of his family. As an illustration. In the Torrey Cedar Company case, the stumpage value of the timber was not over seventy-five or one hundred dollars, but by the labor put upon it there was received for the support of the Indian family for the year nearly three times that sum, two-thirds thereof being theresult o f his labor. It is stipulated in this case that the timber was only cut for the support of the Indian families, and since the Act of

March 3, 1883, it seems to me to have been impliedly recognized by statute that the result of such labor belongs not to the government of the tribe, but to the member performing it.

See sec 2, Act of March 3, 1883, 22 Stat.-at-Large 582, which provides: Sec. ***** The proceeds of all purchases and sales of **timber**, coal or other product of any Indian Reservation, except those of the five civilized tribes, and **not the result of labor of any member of such tribe** shall be converted into the Treasury for the benefit of such tribe. ******

The proceeds of the timber here was the result of the labor of the allotee, Daniel Davids, performed on his allotment, in the possession of which he then was, and his possession recognized and protected by the United States, and his interest in it existing by agreement for a valuable consideration, by the treaty of 1856, which gave him the possession of his allotment for just such use.

More than that, by the treaty it was contemplated that the land should not remain timber land. By Article 2 it was provided that every lot should contain at least one-half arable land.

The cutting of timber for the support of the allottee's family thus tended to bring the land into the very condition which it was provided it should be in under the treaty, and most certainly the government lost nothing thereby, because the government did not intend to retain and did not retain any title or interest for its own account. The withholding of the patent being only for the individual Indian's benefit and at the request of a part of the tribe. The government at the time of the treaty being then willing and intending to give the whole title in fee to the Indians.

And as I have said before, the United States has no beneficial interest in the matter, no duties to perform, and is the mere repository of the title until the council and the president direct it to convey the same, therefore being merely a holder of the title it has no interest in the matter. That is, no interest as an adverse claimant in and to the land. No interest in its own behalf.

The timber here has been cut. The question is, who is entitled to it, or to its value? Really it is a question between the individual and the tribe, because it belonged either to the individual Indian or to the tribe, as a possible remainderman. In no event does it belong to the United States, and I believe we have shown that under the treaty and under rules of law

applicable thereunder, it is the property of the individual Indian.

In what has been said so far with reference to the United States standing in the the matter, we have been speaking merely of its rights under the treaty; as to its relation to the Indian as guardian we will speak later, but first a word as to the,

## ALLOTMENTS.

On the record here the findings of fact stand as a verity. That the allotment to Daniel Davids was made by the headmen or council of the Indians under the treaties and arrangements with the United States is a verity. Likewise the fact that he entered into immediate possession thereof, and has always since claimed the same.

Under Article Three of the treaty, it was provided that the council of the Indians under the direction of the superintendent should make an allotment among the individuals.

It is found in this case that the council of the Indians did make such allotment, and have confirmed to the individuals their allotments or selections.

It is further found that such persons have taken possession thereof.

An allotment having been made by the Indians, we think it will be presumed to have been made as the law directed.

Best vs. Polk, 18 Wall. 112.

Here it was held that it was not necessary to show that all the minutiae, including the agent's certificate was duly carried out. As the grant raised a presumption that the incipient steps required to give it validity have been taken. Mr. Justice Davis stated in his opinion, even if the agent neglected to attach a proper certificate to the roll of the Indians entitled to the reservation, it is difficult to see how they could be prejudiced by this neglect.

If this presumption is not conclusive, even then the failure of the superintendent for so many years to perform his duty and direct the method of allotment, could not prejudice the equitable rights of the Indians. The obligation to make such allotments was imperative and founded, as was the treaty, upon a valuable consideration. The agreement was one which if entered into by an individual a court would enforce. The obligation is not the less imperative and binding entered into

by the government? The equitable right of the allottee at least is perfect. The objection would be technical and of no weight.

Crews vs. Burchan, 1 Black 352, decision by Justice Nelson.

Again the facts are that the government has recognized the allotments by the Indian council to the Indians, by protecting the individuals in the possession of their allotments or selections, and in any event such a recognition is a waiver of any right to insist upon the irregularity, if any there was.

Again neither the tribe, the government or any Indian objects to the allotments made and so there would be a waiver of any such irregularity by common consent. So that I feel free in saying that the allotments, made as shown in this case, give to the possessor all of the rights granted to the allottees under the treaty, and I think they are now entitled to the certificates therein provided for, and under the Act of 1906, are now entitled to patents.

## THE ACT OF FEBRUARY 8, 1887, (24 STATUTES 388.)

The Act of 1887 created different rights than those of the Stockbridge and Munsee Indians under the treaty of 1856.

By section 5 of the Act of 1887, it was expressly provided that "any contract touching the same" (the alloted lands) should be null and void. While under the Stockbridge and Munsee treaty of 1856 there was no limitation or restriction whatever on the use by the allotees of the land or the timber thereon.

Again, under the Act of 1887, Congress was providing the terms of a gift it was to make, and could withhold from the allotees any rights or title it saw fit.

But in the Stockbridge and Munsee treaty the United States was virtually selling the land for a consideration, and the retaining of the legal title was not for the purpose of keeping an interest in the government for its own benefit, but was a mere provision put in at the suggestion of the Indians for their benefit. And under the Stockbridge and Munsee treaties and arrangements no interest remained in the government except the bare legal title held solely for the benefit of the allotees.

The case of United States vs. Gardner, 133 Fed. Rep. 285, cited by counsel for United States, arose over certain lands in the Colville Reservation.

The Act of July 1, 1892 (27 Statutes 62) expressly provided in section 8 "that nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of the said Colville Reservation." That is, in the Colville Reservation case, Congress expressly provided no title or ownership should pass to the Indians. It was not a contract founded on a valuable consideration. The Indians there, as recipients of a promised gift, had no right except at the pleasure of the donor.

And it is always the right of the giver to place any desired conditions or restrictions on the gift or to withdraw the promise before execution.

But in our case the treaty was in effect a land contract for a valuable consideration. As far as the United States retaining any interest or title for its own benefit is concerned, it may be unqualifiedly said that there was no such intention or agreement.

The United States proposition was, for valuable considerations, to give the land in fee simple to the individual Indians to whom it should be alloted. The government was ready and willing at the time of the treaty to give the patents. And it holds the legal title since for the Indians' benefit and at their request, and not for the purpose of securing or retaining any interest whatever in the government.

Therefore, we say, that neither the Act of 1887, nor the decision of United States vs. Gardner supra, has any bearing on this case.

This action, as we have stated before, is an action at law, commenced by the government to recover from the defendant on the theory that this timber belonged to the government as remainder man, and that the Indians had no interest therein, because their right was only one of occupancy, which would not authorize them to commit waste.

We believe this view of the government's to have been misconceived.

We believe that not only the land, but the timber as well, belong in equity to the allotees, that they were the sole equitable owners thereof, and entitled to the possession and use thereof to themselves and their heirs, and ultimately were entitled, as a matter of right—not of favor—to patents giving them the full legal title as well.

That there was no remainder to the United States. Nothing more than the possibility of an escheat, which is common to every title.

**That therefore the United States, suing as it does here in its own behalf, had and has no claim to the proceeds of the timber because it was not in its own behalf the owner thereof.**

That is, the United States does not own the remainder. The rights of the Indians here are more than rights of mere occupancy.

## THE INDIANS AS WARDS OF THE GOVERNMENT.

There is no question but what the Indian tribes are wards of the United States; that they are communities dependent on the United States.

Lone Wolf vs. Hitchcock, 187 U. S. 553.

There is no question but what the United States has the right and that it is its duty to act as guardian for them and to protect their rights.

Neither is it disputed that the United States may sue at law or in equity, or take any other proper step, as guardian, to protect their persons or their property.

Neither do we question the right of the United States, as guardian, either by treaty or by Act of Congress, to regulate the making of contracts with the Indians.

Nevertheless the Indians are not to be put in a class with minors or the insane.

The Indians have, unless restricted by treaty, or the Act of Congress, or public policy, the right to contract for themselves. That is, they are not incompetent to make a contract, unless it is so declared.

Their rights to make contracts, for their necessaries and supplies, contracts for the sale of their products and the like, has never been questioned. So, where it is not prohibited, their sales of real estate under title from the government, has been upheld.

Crows vs. Burchan, 1 Black 352.
Doe vs. Wilson, 23 How. 457.

Of course, it is probably true because of the condition of the Indian, that any contract whatever made with him, is liable to be questioned by the United States, as guardian, in a proper proceeding, and that it is liable to be avoided, because of fraud or overreaching, but all contracts with the Indians not expres-

ly prohibited are, I think, good and valid, unless tainted with fraud or overreaching.

So in the case at bar I do not see that the fact that the United States is the guardian and that the Indian is the ward in the sense in which these terms are used in the law, in any way, in this case can affect the purchaser of the cut timber from the Indian, if he had the lawful right to cut the same.

In this case there was no "over-reaching in any manner;" the logs were bought by the defendant in good faith.

Opinion of trial court, Record, page 17.

The defendant paid a valuable and fair consideration.

6th Finding, Record, page 11.

Neither Congress, the President, nor the Department as guardian of the Indians ever attempted to exert their control as guardian to in any way interfere with the cutting of this timber nor its purchase by the defendant until the time of the commencement of this suit in 1902, three years after the cutting.

Opinion of lower court, Record, page 17.

Stipulation, Record, page 9.

Complaint, Record, page 2.

The Indians had cut and sold timber for many years.

And until the government as guardian prescribed regulations in the matter, the allotee, though an Indian, could make valid contracts for the disposition of the product of his land, and such contracts would only be reviewable by the government in a suit as guardian or trustee, and then only where there had been over-reaching, fraud or inadequate consideration. None of which exist in this case.

This suit is not brought by the government as the guardian or trustee of the Indians, nor for their benefit.

It is brought solely on the theory that the Indian rights were merely rights of occupancy, and that the government as remainder man was itself and for its own benefit entitled to sue for and recover the value of the timber. Such are the allegations of the complaint.

Record, page 2.

Such is the theory upon which the case has been maintained.

Opinion of lower court, Record, page 14.

Brief of United States, Record, pages 29-32.

We respectfully submti, that under the facts found this action cannot be maintained by the United States.

## ACT OF 1906.

The Indians have always claimed that their allotments were valid, that under the contract treaty of 1856, the government only held the bare legal title for their benefit, and that they were in effect purchasers of this land, and the individual allotees the sole beneficial and equitable owners thereof, the only restriction on their exercise of ownership being their lack of power to alienate the fee before their patents issued.

"The allotees have constantly asserted ownership and right to take the timber without restriction under the treaty."

Opinion of the trial court, Record, page 14.

They had up to the bringing of these suits in 1902 exercised their claimed right of cutting the timber and the government had recognized them as allotees.

By the Act of 1906 the government adopted the construction put upon the treaty of 1856 by the Indians as correct, and by that Act the allotments are to be held by them in fee simple.

All of this is, we think, a construction of the terms of the contract treaty by the parties and in accordance with the position of the allotees.

The court should, we think, adopt the construction thus put upon the treaty by both parties thereto.

## MEASURE OF DAMAGES.

Counsel for the government mentions the question of "measure of damages."

The findings of the trial court being to the effect that the logs were cut by Daniel Davids in good faith, he claiming and believing that he had the right to so cut them, and that the defendant bought the same in good faith, believing said Daniel Davids to be the bona fide owner, and that the same were bought for a valuable and fair consideration, it is, we believe, the settled law that the plaintiff could, in any event, recover no more than the stumpage value.

United States vs. St. Anthony R. R. Co., 192 U. S. 524;
Durant Mining Co. vs. Percy Mining Co., 93 Fed. Rep. 166;
Gentry vs. United States, 101 Fed. Rep. 51;

In United States vs. Cook, 106 U. S. 432, where this court held a purchaser liable for a higher measure of damages, the certificate of facts upon which that case came to this court certified that the timber was knowingly and wrongfully taken from the lands by the Indians.

## IN CONCLUSION.

We submit that the rights of the allotees here were greater than a "mere right of occupancy."

That the United States does not stand as the remainder man and has no interest in its own behalf in the land or timber.

That there was nothing to prevent the United States conveying a virtual fee to these allotees by treaty.

Delaware Indians vs. Cherokee Nation, 193 U. S. 129-136.

That the treaty of 1856 was a contract with the Indians for a valuable consideration, vesting in them rights in the land which cannot be divested without their consent.

That until the government as guardian places restrictions upon them, the allotees under such treaty have the right to cut and sell the timber on their allotments, subject to the right of the government as guardian to inquire into the fairness and reasonableness of their contracts for the disposal thereof.

That such is the construction placed upon the treaties by the parties.

That the judgment of the lower court is right on the record, and should be affirmed.

Respectfully submitted,

CHARLES BARBER,
For the Paine Lumber Company.

J. C. THOMPSON,
Of Counsel.

## APPENDIX "A."

Department of the Interior, United States Indian Service.
Green Bay Agency, Keshena Wis., March 6, 1906.

Thompson, Thompson & Pinkerton,
Attorneys at Law,
Oshkosh, Wisconsin.

Gentlemen:

Your letter of the 3rd instant at hand and contents noted.

In reply you are informed that the membership of the Stockbridge and Munsee Indians under my jurisdiction is about 550; that they receive semi-annual annuity payments; that the amount of each payment is $1,599.71; that the share received by each member is about $2.90 each payment, or a total of about $5.80 per year; that they receive no other benefits from the Government, other than the small amount provided for the carrying on of a day school for the benefit of their children.

Trusting that this will cover the information desired, I remain,

Yours truly,

SHEPARD FREEMAN,
Supt. & Spl. Disb. Agt.

Dict. C. N. F.
(MWD)

Per C. N. F.